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No. 78-783

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERT REECE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner seeks review of his conviction for making threats of force against two Internal Revenue Service agents while they were attempting to enforce a tax levy on property belonging to a third party. He contends that (1) the trial court erred in refusing to give certain of his proposed instructions, (2) the statute under which he was prosecuted is unconstitutionally vague, (3) the agents were not legally engaged in their official duties at the time of the alleged offense, (4) the agents were required to

have a warrant, (5) the agents failed to serve the notice of levy on the proper party, and (6) the trial court improperly granted the government's motion *in limine*.

After a jury trial in the United States District Court for the District of Montana, petitioner was convicted of endeavoring, by threats of force, to intimidate and impede Revenue Officers Timothy M. Chamberlin and Mark J. Murray while, in their official capacities, they were attempting to levy upon personal property belonging to a third party, in violation of 26 U.S.C. 7212(a) (R. 1).[1] The trial court deferred sentence, fined petitioner $500, and placed him on probation for one year (R. 130). The court of appeals affirmed (Pet. App. A).[2]

The evidence adduced at trial may be summarized as follows: Prior to March 10, 1977, Revenue Officer Murray was assigned to collect delinquent federal taxes owed by M-R Enterprises, Inc. He had determined that the corporation was located at 926 Main Street in Billings, Montana, and that its responsible officer was Michael Reece.[3] Murray also had determined that M-R Enterprises owned a 1973 Chevrolet custom pickup truck, and that no one else

[1] "R." refers to the duplicated repaginated record filed in the court of appeals.

[2] The judgment of the court of appeals was entered on June 8, 1978, and a petition for rehearing was denied on August 28, 1978. The petition for a writ of certiorari was filed on October 28, 1978, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court.

[3] Michael Reece is petitioner's son (Tr. 130-131).

had any recorded interest in the vehicle (Tr. 17-18).

On March 10, 1977, Revenue Officer Chamberlin executed a levy on the truck, and he and Revenue Officer Murray attempted to seize it (Tr. 58). The truck was parked on an open lot in front of a trailer house at 926 Main Street in Billings. Both the truck and the trailer bore signs reading "M-R Enterprises, Inc." There was no fence or other barrier between the property and the street, and the parking lot appeared to be that of a business establishment held open to the public (Tr. 18, 20, 59, 67). The property was owned by Able Contractors, of which petitioner was president (Tr. 181). Although there was testimony that M-R Enterprises had ceased doing business at that location, nothing on the premises so indicated on the date of the seizure (Tr. 107-108, 181).

The revenue officers went to 926 Main Street and entered the trailer house, which was not locked, where they found petitioner's daughter, Ramona Reece Murray (Tr. 59, 138). The officers identified themselves and asked to see Michael Reece, who was not there, and told Ms. Murray they were there to seize the truck (Tr. 50-59, 108-109, 116). Ms. Murray thereupon telephoned petitioner (Tr. 117-118). Officer Murray gave Ms. Murray a copy of the notice of levy (Tr. 28-29), and Revenue Officer Chamberlin went outside to attach notices of seizure to the truck. While he was attaching the notices, petitioner skidded into the parking lot in his own truck, threw open the door, got out and ran toward Officer Chamberlin shouting that the officers had no right to be on the

property, and that they were not going to seize the truck belonging to M-R Enterprises. Petitioner tore a notice of seizure off the truck (Tr. 96).

Revenue Officer Murray came out of the trailer house and identified himself to petitioner, who continued to shout at the officers (Tr. 32, 33, 96-98). Petitioner told the officers that he was going to call the sheriff and returned to his own vehicle. The officers began to reattach a notice of seizure to the windshield of the truck (Tr. 32, 98, 99). Petitioner thereupon stepped out of his vehicle, tore off the notice again and said, "You guys better be gone when I get back because I'm coming back armed and then you will really be gone" (Tr. 32-35). The officers concluded that petitioner had threatened them and left the premises without the truck (Tr. 35). Petitioner admitted at trial that he knew during the confrontation that Chamberlin and Murray were Internal Revenue officers, and that they were acting in their official capacities in attempting to seize the truck belonging to M-R Enterprises (Tr. 174).

1. Petitioner first argues (Pet. 10-19) that the trial judge erred in refusing to instruct the jury that in order to convict it was required to find that petitioner "made an unequivocal, unconditional and specific expression of intent to immediately inflict injury" (Pet. 13) upon the revenue officers.[4] In his

[4] Petitioner's requested instructions do not conform to his present argument. His third requested instruction defines "threat of force" as "an avowed present determination or intent to intimidate or impede in the present or future" (Pet. 13).

view, the First Amendment requires a finding that the individual intended to make a true threat and that the absence of such an instruction permitted the jury to find him guilty merely for uttering words capable of being understood in a threatening manner.

But the statute under which petitioner was charged, 26 U.S.C. 7212(a), does not prohibit the mere making of threats, as do the provisions involved in the cases upon which petitioner relies.[5] To the contrary, Section 7212(a) punishes one who knowingly "endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity * * *." See *United States* v. *Varani*, 435 F.2d 758, 762 (6th Cir. 1970). See also *United States* v. *Johnson*, 462 F.2d 423 (3d Cir. 1972), cert. denied, 410 U.S. 937 (1973); *United States* v. *Sciolino*, 505 F.2d 586 (2d Cir. 1974). The requirement that the threat of force be knowingly made for the purpose of attempting to impede or intimidate a government officer acting in his official capacity effectively excludes from the coverage of the statute statements merely made in jest or as hyperbole.

Here, the trial court instructed the jury that the government was required to prove beyond a reasonable doubt that petitioner, "by threats of force, endeavored to intimidate and impede Internal Revenue Officers Chamberlin and Murray during their at-

[5] *Rogers* v. *United States*, 422 U.S. 35 (1975) (18 U.S.C. 871(a)); *Watts* v. *United States*, 394 U.S. 705 (1969) (18 U.S.C. 871(a)); *United States* v. *Kelner*, 534 F.2d 1020 (2d Cir.), cert. denied, 429 U.S. 1022 (1976) (18 U.S.C. 875(c)).

tempt to levy upon the pickup truck" (Tr. 209). Under this instruction, the jury could not have found petitioner guilty merely for uttering words in jest or for any other type of unintentional conduct that may have been interpreted by the jury as constituting a threatening manner. Rather, the instruction required the jury to find, and it so found, that petitioner's statement was made as an intentional attempt to intimidate or impede the officers in their official capacity.

Nor is there merit to petitioner's argument (Pet. 20-27) that Section 7212(a) is unconstitutionally vague unless it is read to prohibit only the making of a "true threat" (*id.* at 20). As we have pointed out above, the statute only proscribes knowing endeavors, by force or threats of force, to impede or intimidate government officers engaged in enforcing the internal revenue laws. The statute specifically defines threats of force as "threats of bodily harm to the officer or employee of the United States or to a member of his family." Thus, Section 7212(a) gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden * * *," *United States* v. *Harriss*, 347 U.S. 612, 617 (1954), and therefore complies with constitutional due process requirements.

2. Petitioner also contends (Pet. 24-27) that the government failed to show that the revenue agents were acting in their official capacities, and that "[s]ince the seizure was not shown to have been lawful, the defendant was merely exercising his right of control over his own property" (*id.* at 25). Petitioner

admitted at trial, however, that he did not own the vehicle the revenue officers were attempting to seize (Tr. 143-144). Moreover, the officers testified without contradiction that they were performing their official duties under the internal revenue laws in attempting to seize the truck (Tr. 14-18, 57-59), in accordance with their authority under 26 U.S.C. 6331. Thus, the record in this case fully supports the legality of the seizure.

At all events, there is no requirement that the government establish the legality of the seizure in order to sustain a conviction for a violation of Section 7212(a). Concededly, some of the cases relied upon by petitioner suggest that the lawfulness of the seizure must be shown.[6] But the statute only requires that the officers be acting in an official capacity, and the more recent authorities quite clearly indicate that the lawfulness of the seizure need not be established. See *United States* v. *Harris*, 521 F. 2d 1089, 1092 (7th Cir. 1975); *United States* v. *Oliver*, 421 F. 2d 1034, 1036-1037 (10th Cir. 1970); *United States* v. *Scolnick*, 392 F. 2d 320, 326 (3d Cir.), cert. denied, 392 U.S. 931 (1968). As the Seventh Circuit noted in *United States* v. *Harris*, *supra*, 521 F.2d at 1092, "[i]f the rule were otherwise it would 'en-

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[6] *Cooper* v. *United States*, 299 F. 483 (3d Cir. 1924); *United States* v. *Dentice*, 289 F. Supp. 799 (E.D. Wis. 1968). Petitioner's reliance (Pet. 25) on *United States* v. *Heck*, 499 F.2d 778 (9th Cir. 1974), is misplaced. There, the Ninth Circuit specifically declined to pass on the question (499 F.2d at 783-784).

courage violent self-help where civil remedies are admittedly available.' " [7]

3. Finally, petitioner contends (Pet. 31-44) that the trial court erred in granting the government's motion *in limine* to exclude evidence regarding a prior seizure (the so-called "TBM" seizure) that petitioner believed to have been unlawful. But the trial court acted within its discretion in excluding evidence of the earlier seizure because it was irrelevant to the questions in issue here and could have been prejudicial to the government and confusing to the jury. Fed. R. Evid. 401, 402 and 403. Moreover, contrary to petitioner's claim, the court's ruling on the motion *in limine* did not preclude him from cross-examining the officers concerning his prior encounter with them in an attempt to show bias or prejudice on their part. As the court of appeals

[7] Petitioner also claims (Pet. 27) that the officers were required to obtain a search warrant before entering the parking lot to seize the vehicle. But as the decision below correctly recognized (Pet. App. A), this Court held in *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338 (1977), that no search warrant was necessary to levy upon and seize property located, as in this case, on an open lot.

Petitioner further contends (Pet. 28-31) that the officers were required under Treasury Regulations on Procedure and Administration § 301.6331-1(a) (26 C.F.R.), to serve a notice of levy upon him, as a third party in possession of the truck, prior to seizure. The record, however, shows that petitioner had no interest in the truck and was not in possession of it at the time of the seizure. Rather, it belonged to the delinquent taxpayer, M-R Enterprises, and was parked on an open lot (Tr. 17-18, 20, 59, 67, 174). A copy of the notice was served upon Ms. Murray, who was the only other person on the premises at the time (Tr. 28-29).

noted (Pet. App. A), the trial court allowed petitioner's counsel to elicit testimony from Revenue Officer Chamberlin that petitioner previously had ordered Chamberlin out of an office petitioner maintained at 815 Main Street (Tr. 81). Thus, petitioner was not prevented from attacking Chamberlin's credibility.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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